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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-415

PORTLAND CEMENT ASSOCIATION, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 513 F.2d 506.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1975. A timely petition for rehearing

en banc was denied on June 19, 1975. The petition for a writ of certiorari was filed on September 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of Section 111 of the Clean Air Act, as added, 84 Stat. 1683, 42 U.S.C. 1857c-6, are set forth at Pet. App. 109-111.

QUESTIONS PRESENTED [1]

1. Whether the Environmental Protection Agency (EPA) Administrator adequately took cost into account in promulgating new source performance standards for portland cement plants under Section 111 of the Clean Air Act, 42 U.S.C. 1857c-6.

2. Whether constitutional guarantees against discrimination require that emission standards be identical for different industries emitting the same type of pollutants.

[1] Petitioner includes as a question presented: "Is a mass standard to measure *total* pollution valid if it can be violated by a *momentary* excessive emission?" (Pet. 2, emphasis in original.) EPA's regulations require a minimum of three hours of sampling to determine compliance. 40 C.F.R. 60.8(f), 39 Fed. Reg. 9314; 40 C.F.R. 60.64(b), 39 Fed. Reg. 20793. Thus, petitioner is incorrect in stating that a momentary emission may constitute a violation. In its opinion of May 22, 1975, the court of appeals stated "[this question] was not at issue on the remand and we accordingly do not feel called upon to deal with it" (Pet. App. 4).

3. Whether the plume opacity standard is invalid due to its alleged "subjectivity", "inaccuracy", and failure to measure actual levels of pollution.

STATEMENT

Section 111(b) of the Clean Air Act (hereinafter referred to as the "Act"), 42 U.S.C. 1857c-6(b), requires the EPA Administrator to publish a list of categories of significant stationary air pollution sources that he determines may contribute to endangering public health or welfare. After publishing the list, the Administrator must establish performance standards for new sources in those categories which are attainable by the best demonstrated system of emission reduction. In formulating the standards, the Administrator is required to take "into account the cost of achieving such reduction." 42 U.S.C. 1857c-6(a)(1).

On December 23, 1971, the Administrator promulgated under Section 111 of the Act two standards that limit particulate emissions from new or modified portland cement plants (36 Fed. Reg. 24876, Pet. App. 10). One of the standards—the mass emission standard—limits particulate emissions to a certain quantity per ton of feed, and the other—the opacity standard—limits the density of exhaust gases.

Thereafter, petitioner filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit seeking to have both of these new source standards set aside for a number of reasons.

On June 29, 1973, the court of appeals affirmed in part, reversed in part, and remanded the case to EPA for further proceedings (Pet. App. 7-59). In pertinent part, the court determined: (1) that EPA had adequately taken costs into account in setting standards of performance, with a possible exception in regard to which the court remanded (Pet. App. 28-30);[2] (2) that EPA had adequately explained the reasons for the different standards for power plants and incinerators (which petitioner had contended were discriminatory), but also that EPA is not generally required to present affirmative justification for different standards for different noncompetitive industries since numerous factors peculiar to a specific industry determine the feasible measure of control (Pet. App. 30-33);[3] and (3) that on remand EPA must further consider and explain how the opacity standard can be measured with reasonable

[2] The court remanded the case to EPA to "consider, as a matter of economic costs, contentions and presentations submitting that the standard as adopted unduly precludes supply of cement * * *" (Pet. App. 30).

[3] EPA had explained that tests at existing plants indicated that superior technology was being used by cement plants. The court of appeals, noting a possible change in the technology available to power plants and incinerators, stated (Pet. App. 32, n. 55):

> If the same technology is now available and in use for incinerators, steam power plants and cement plants, the Administrator on remand may wish to offer some further explanation of the difference in standards set simultaneously for the three industries.

accuracy. A petition for a writ of certiorari filed by the petitioner in this case was denied. 417 U.S. 921.

On remand, EPA determined that meaningful cost-benefit analysis of the standards is not presently possible, nor is it required by the statute (Pet. App. 61). However, EPA again recognized and undertook to fulfill its responsibility to take costs of control into account when setting standards. It stated that costs of control which the industry could not bear and survive, which are grossly disproportionate to the emission reduction achieved, or which would result in the inability of new plants to compete with established firms in the industry, will not be required (Pet. App. 61-62). EPA also found that there were valid technological reasons for setting different particulate mass emission standards for portland cement plants, power plants and municipal incinerators (Pet. App. 62-63).[4] Finally, EPA found that opacity measurements can be reliably made and are a reliable indicator of pollutant emissions. Numerous tests demonstrate that trained opacity observers can read plumes with a normal error not exceeding 7.5 percent opacity

[4] Petitioner is incorrect in its statement that the EPA remand response "[c]onceded that power, cement and asphalt concrete plants all can control particulate emissions to the same degree" (Pet. 8). EPA stated that it now appears that portland cement plants, municipal incinerators and power plants "may" be able to achieve the same levels of control. Due to this fact the Administrator indicated that he would consider tightening the standards for power plants and incinerators. Petitioner's statement regarding EPA's alleged concession is particularly erroneous concerning asphalt since the standard for that industry was not even mentioned (Pet. App. 62-63).

(Pet. App. 73), and that there is little likelihood that any source will be prejudiced by the opacity standard since EPA takes this margin of error into account when determining possible violations (Pet. App. 78, 79).

On review after the remand, the court of appeals affirmed EPA's standards (Pet. App. 1-5). The court reiterated its view that EPA was not required to undertake quantified cost-benefit analyses, measuring benefit to ambient air conditions against the cost of pollution control devices. Noting petitioner's admission that the standards were achievable by the portland cement industry (Pet. App. 3), and that the industry had not shown inability to adjust to the standards in a healthy economic fashion (Pet. App. 4), the court held that EPA had fulfilled its statutory responsibility.

As to the claim of discrimination, the court of appeals held that there was no proof of unreasonableness in the diversity of standards (Pet. App. 3). The court, however, expressed the belief that EPA would, as it had promised (Pet. App. 63), consider the diversity of standards in light of accumulating experience (Pet. App. 3).

Finally, the court approved EPA's extensive and careful analysis of the achievability and reliability of plume opacity standards (Pet. App. 4). The court manifested a concern about the propriety of judicial interference in the formative stages of pollution control efforts, noting that EPA's conclusions and suggestions concerning the problems of opacity standards were well reasoned (Pet. App. 4).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court, and presents no question warranting review.

1. Petitioner contends that Section 111(a)(1) of the Clean Air Act requires EPA to undertake quantitative cost-benefit analyses before promulgating pollution control standards. The pertinent statutory language requires the Administrator of EPA to establish standards of performance which reflect "the *degree of emission limitation achievable* through the application of the *best system* of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." (Emphasis added.) This is what the Administrator has done in this case. Petitioner seeks to have the Court impose a particularized methodology for arriving at standards that conform with the statute, without addressing the fact that the standards here conform with the statute.

EPA, relying on economic studies of the industry and its own extensive economic analysis, took costs into consideration as required by the statute. EPA has indicated on the record that it would not impose standards when the cost of meeting such standards would be so great that the industry could not

survive (Pet. App. 61). But beyond that,[5] EPA has said it would not require a measure of control that was "so grossly disproportionate" to the cost (Pet. App. 61), or that would result "in the inability of new plants to compete with established firms in the industry" (Pet. App. 62). Based on these standards, EPA determined that the standard it set for the portland cement industry is achievable by that industry. Petitioner has admitted that the standard is in fact achievable (Pet. App. 3). Moreover, petitioner has failed to show an "inability to adjust itself in a healthy economic fashion" (Pet. App. 4). Indeed, the opposite is suggested by EPA's note in the remand that major expansions of existing portland cement plants have taken place since the standard went into effect.

The court of appeals, in its first opinion, rejected the necessity of a quantified cost-benefit analysis that measured benefit to ambient air conditions against cost (Pet. App. 28-29):

> However desirable in the abstract, such a requirement would conflict with the specific time constraints imposed on the Administrator. The difficulty, if not impossibility, of quantifying the benefit to ambient air conditions, further militates against the imposition of such an imperative on the agency. Such studies should be considered by the Administrator, if adduced in comments, but we do not inject them as a necessary condition of action.

[5] Petitioner seriously misstates EPA's position on costs when it says that EPA will consider the cost factor only if the cost of control threatens the survival of the industry (see Pet. 11).

On remand, EPA agreed that a cost-benefit analysis of the kind demanded by petitioner was a practical impossibility.[6] It also agreed that such an analysis was not required by the statute.[7] It reasoned that the purpose of the statute's requirement was not to assure maximum cost effectiveness, but to take the well-being of the industry into account in achieving the best available measure of control. This EPA did.

2. Petitioner contends that the portland cement standard is discriminatory. It does not argue that the standard is unreasonably burdensome; indeed petitioner concedes that the industry can meet the applicable standard (Pet. App. 3). Petitioner's argument simply is that the standard is more stringent than standards set for power plants and incinerators.[8]

[6] Petitioner's contention that EPA has elsewhere said otherwise (Pet. 14), is not supported by the evidence it advances: none of the statements attributed to EPA suggests that quantified cost-benefit analyses, measuring, in the context of each particular source, benefit to ambient air quality against cost of control, for the purpose of determining maximum marginal cost effectiveness, can be developed, especially in the short time sequence provided by the statute for establishing standards of performance (see Pet. App. 14).

[7] EPA did consider cost-benefit information submitted by petitioner, which was conceptual in nature and was found by EPA not to be directly related to the portland cement industry.

[8] It should be noted that although the portland cement standard is in fact more stringent than those for certain new

At the time the standards were developed there was a reasonable basis for different measures of control. As EPA said in its "Supplemental Statement in Connection With Final Promulgation" (37 Fed. Reg. 5767; see Pet. App. 31), and as it further explained in its remand response (Pet. App. 62-63), the standards for each industry were based on the particular technology that had a proven applicability to that industry. The standards for power plants and incinerators were based on the use of precipitators (Pet. App. 62); a precipitator is a device that collects dust particles from an exhaust gas after the particles have been electrically charged and passed through an electrical field (see Pet. App. 35). The standards for cement plants, on the other hand, were based on the use of glass fabric bags located in "bag houses"; for this method, the exhaust gas is cooled and passed through the bags, which filter out the particulate dust (*ibid.*). At the time the standards were promulgated, "the removal efficiencies being achieved by properly maintained and operated baghouses on Portland cement plants were superior to those being achieved by power plants and incinerators * * *" (Pet. App. 63). For this reason "the effective emission concentration limits were more restrictive for Portland cement plants" (*ibid.*).

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source categories, it is less stringent than the standard for others. Compare 40 C.F.R. 60.122(a)(1) (secondary lead smelters), 60.132(a)(1) (secondary brass and bronze ingot production plants), 60.142(a)(1) (iron and steel plants).

This factual explanation is a part of the record; the court of appeals found it reasonable (Pet. App. 3, 31). Certainly there is no constitutional or statutory infirmity with reasonably based variations in measures of control. Indeed, we believe that the court of appeals was correct in its original opinion, holding that as a general matter EPA "is not required to present affirmative justifications for different standards in different industries" (Pet. App. 32). Section 111(a)(1) of the Act requires that a new source standard reflect the best "adequately demonstrated" system of emission reduction. Inevitable variations of process, raw materials, control techniques in use, and other factors in different industries result in different achievable limits for various industries. Also, cost factors, which must be taken into account, are as a rule different for the various industries and thus result in different standards.

In this case, there is evidence that the glass fabric bag technology is being introduced into the power plant and incinerator industries (see Pet. App. 31, n. 55). Moreover, EPA has indicated that precipitator technology may be equally as effective as the baghouses used by portland cement plants (Pet. App. 63). EPA has said (*ibid.*) that on this basis it "will consider whether the particulate standards for the other two industries should be tightened." EPA's proposal to consider tightening the standards to make them more nearly similar in all three industries should satisfy petitioner's complaint that the standards are now arbitrarily different.

3. Finally, petitioner contends that the opacity standard is invalid because it fails "to reliably measure pollutant volume with reasonable accuracy" (Pet. 9). The argument is two pronged: first, petitioner states that "opacity of a plume does not 'necessarily' or 'universally' indicate the amount of pollution it contains" (Pet. 17). Second, petitioner claims that "visual evaluation of plume opacity is inaccurate" (*ibid.*). Petitioner contends that under the so-called "irrebuttable presumption" cases, see, *e.g.*, *Vlandis* v. *Kline*, 412 U.S. 441, a statutory or regulatory classification, viewed as a means to an end (*i.e.*, the legislative purpose), must not operate as an irrebuttable presumption unless the presumption is "necessarily or universally true in fact" (Pet. 16).

However, petitioner has not shown that plume opacity standards are irrebuttable or conclusive presumptions. Continuous monitoring devices are available to operators of portland cement plants; these devices can measure opacity levels or the level of particulate emissions. See 39 Fed. Reg. 32854, 32860-32870. EPA has said that it would "accept as probative * * * the results of * * * continuous monitoring * * * which indicate that the opacity at the time [of the visual inspection] * * * was not in excess of the standard * * *" (Pet. App. 89). Petitioner can point to no evidence that EPA would not also accept as probative results of continuous monitoring showing that particulate emissions were below the prescribed standard, even though plume opacity was

excessive.[9] Moreover, in discussing the tandem operation of the opacity and the emission standards, EPA said, "In some cases, of course, [where visual inspection of plume opacity suggests noncompliance] a full investigation of operating and maintenance conditions will be desirable" (Pet. App. 66). Thus, even assuming that plume opacity is used as a measure of particulate emissions, the opacity standards do not establish an irrebuttable measure of such emissions.

In any event, to contend that a "conclusive presumption" in the area of economic regulation perforce violates the Fifth Amendment (Pet. 16-17) is to argue for a return to the days of *Lochner* v. *New York*, 198 U.S. 45, and *Adkins* v. *Children's Hospital*, 261 U.S. 525. Whether the substantive rule of law embodied in EPA's standards deprives petitioner of due process does not depend on labels;[10] when regulation of business is in question the test

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[9] EPA has promulgated an amendment to its regulations that permits the owner or operator of a source to apply for a variance from the applicable opacity standard when, in the exceptional case, the facility is complying with other standards while not meeting opacity standards. This amendment is designed to assure that there is a correlation between the opacity and the emission standards such that each operator will be able to meet the former at all times during which he is meeting the latter. See 39 Fed. Reg. 39872-39874.

[10] Even if the EPA's standards were correctly characterized as "conclusive presumptions" (but see p. 12, *supra*), the "creation by law of such presumptions is after all but an illustration of the power to classify." *Jones* v. *Brim*, 165 U.S. 180, 183.

is that stated by the Court in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 391: "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." EPA's standards meet that test. See *Mourning* v. *Family Publications Service*, 411 U.S. 356, 371, 377.

Petitioner's characterization of the two-fold unreliability of plume opacity standards was quite carefully and intensively studied by EPA, and rejected (Pet. App. 64-102). The court of appeals held that there was no sound basis for rejecting these factual findings (Pet. App. 4). EPA found that in reality the opacity standard is a very close fit with the particulate emission standard, despite the theoretical possibilities raised by petitioner (Pet. App. 90-102). And, after extensive testing, EPA concluded that visual observations of plume opacities were almost universally reliable within a given, small margin of error (Pet. App. 67-90). To assure fair treatment, EPA has stated that it will not seek enforcement action against facilities based on opacity readings that do not exceed the standard by more than this margin of error (Pet. App. 79).[11]

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[11] EPA also noted throughout its response to the court of appeals' remand that in view of petitioner's and others' input concerning the plume opacity standards, EPA was amending its regulations in several respects. See 39 Fed. Reg. 32852-32854, 32857-32858, 39872. The court of appeals was quite clearly sensitive to EPA's good faith efforts and to the wisdom of judicial noninterference in the formative stages of the technical aspects of environmental control (Pet. App. 4).

Finally, the calculus petitioner would have the Court impose fails to consider the finding by EPA that the opacity standard is presently crucial to the success of any regulatory scheme (Pet. App. 65-66). The industry and EPA may eventually develop a measure of compliance which is more acceptable. But until that occurs, plume opacity standards monitored by visual inspections are a necessary, as well as reliable and achievable, means of effectuating the purpose of the Clean Air Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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